IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.386 OF 2006

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Eurissko Agro Limited ...Petitioner

v/s.

Wes Tech Associates

and others ...Respondents

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Dr.V.V. Tulzapurkar with Ms.Alpana Ghone and Mr.Munaf Virjee i/b D.S.K. Legal for the Petitioner.

Mr.Atul Vanarase for the Respondents.

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CORAM: D.K.DESHMUKH, J.

DATED: 20TH NOVEMBER,2006

P.C.:

1. By this Petition the Petitioner challenges the

award made by the arbitral tribunal dated 2-10-2005 directing the Petitioner to pay an amount of Rs.8,75,000/- and other amount as also the order dated 4-10-2004 passed by the same arbitral tribunal.

2. The facts that are material and relevant for deciding this petition are that an application under section 11 of the Arbitration Act was filed before this court by the Respondents for appointment of arbitrator. To that application the present Petitioner company/ Eurissko Agro Limited was also joined as Respondent. It appears that an objection was raised on behalf of the Petitioner, which was Respondent No.4 in the application filed under Section 11 before this court, which was registered as Arbitration Application No.11 of 2003, that there is no arbitration agreement between the present Petitioner and the Respondent. The nominee of the Hon'ble Chief Justice under Section 11 decided that petition by order dated 25th April, 2003 and recorded categorically a finding that there is no arbitration agreement between the Respondents and the present Petitioner. It appears that the proceedings commenced before the arbitral tribunal and the arbitral tribunal issued a notice to the present applicant. On receiving that notice, the Petitioner by reply contended that there is no arbitration

agreement between the Petitioner and the Respondent. The Petitioner also relied on the order passed by this court dated 25th April, 2003 under Section 11 holding that there is no arbitration agreement between the Petitioner and the Respondent. That application was decided by the arbitral tribunal by its order dated 4th October, 2004 and objection to the jurisdiction of the arbitral tribunal was rejected and the arbitral tribunal proceeded further and made the award directing the Petitioner to pay the amount mentioned above. Therefore, the Petitioner is challenging the award as also the order dated 4th October, 2004 in this petition.

3. The learned Counsel appearing for the Petitioner submits that in view of the categorical finding recorded in the order passed in the petition filed under Section 11 that there is no arbitration agreement between the Petitioner and the Respondents, the arbitral tribunal had no jurisdiction to make any award against the Petitioner. The learned Counsel relies on a judgment of the Supreme Court in the case of (2005) 9 Scale 1 M/s.S.B.P. & Co. v/s. M/s.Patel Engineering Ltd. & Anr. to contend that the finding regarding existence of the arbitral agreement recorded in the order passed under Section 11 of the Act is binding on the arbitral tribunal.

4. I have also heard the learned Counsel appearing for the Respondents. Perusal of the order dated 4th October, 2004 shows that this aspect of the matter has been considered by the arbitral tribunal in paragraphs 10 & 11 of that order. They read as under:

> 10. In our opinion, the orders passed by the Hon'ble High Court in Arbitration Application No.11/2003 are orders under Section 11 of the Arbitration Act. The Arbitration Act provided for appointment of an Arbitrator by the High Court under certain circumstance vide Section.
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> 11. We feel that the said order is to be read only for the purpose of finding out as to whether an arbitrator has been appointed by the Hon'ble High Court. any observations made by the Hon'ble High Court while passing order under Section 11 of the Act, are not to be treated as a judicial finding. We feel that in appropriate cases, the Arbitration Tribunal has powers to consider independently the matter before its irrespective of the observations, which might have been made by a High Court while passing orders under Section

11 of the Act.

5. Perusal of the above observations made by the arbitral tribunal shows that according to arbitral tribunal the finding recorded by the judicial authority under Section 11 about existence of the arbitration clause is not binding on the arbitral tribunal. This is in terms contrary to the law laid down by the Supreme Court in its judgment in the case of Patel Engineering, referred to above. The Supreme Court in categorical terms has laid down that when question of existence of arbitration agreement between the parties is raised in a petition filed under Section 11, the judicial authority has the jurisdiction to decide that question and the finding recorded by the judicial authority is final subject to its challenge before the Supreme Court. In other words, the finding recorded by the judicial authority under Section 11 about the existence of the arbitration agreement is binding on the arbitrator. The order passed by the arbitral tribunal holding that it has jurisdiction as against the present Petitioner by order dated 4th October, 2004 is therefore unsustainable and has to be set aside.

6. In the result, therefore, the present petition succeeds and the award impugned in this petition in

so far as it directs the Petitioner to pay any amount to the Respondents is set aside. The Respondents are directed to pay costs of this petition to the Petitioner, as incurred by the Petitioner.

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